A

MUHAMMAD TAUFIQ ABDULLAH

v.

PUBLIC FINANCE BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[ORIGINATING SUMMONS NO: S6-24-346-2003]
10 OCTOBER 2007

C ***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside, application for - Whether an action commenced merely to have an earlier perfected and sealed order declared null and void and to be set aside can be maintained*

D ***CONTRACT:*** *Hire purchase - Guarantee - Whether guarantee properly executed - Section 22, Hire Purchase Act 1967 - Guarantee to be executed in presence of Magistrate, Commissioner for Oaths or Notary Public - Whether provision in s. 22 is substantive or merely a formality or procedural step - Whether breach of s. 22 is a breach of a substantive provision of law*

E

CONTRACT: *Hire Purchase - Guarantee - Guarantee to pay owner an aggregate sum larger than balance originally payable under hire purchase agreement - Whether valid - Guarantee not limited to payment of balance originally payable but included default charges that would become payable by hirer - Default charges not stated in hire purchase agreement - Guarantee thus void by operation of s. 22 of Hire Purchase Act 1967 - Objection regarding contravention of s. 22 not raised in Sessions Court - No substantial miscarriage of justice*

F

G ***CONTRACT:*** *Hire purchase - Guarantee - Omission in guarantee to state object or goods that are subject matter of guarantee - Whether guarantee void - Guarantee not upon an entirely separate document but part of hire purchase agreement - Goods specified in hire puchase agreement - Guarantee valid*

H

The plaintiff applied for a declaration that a guarantee agreement dated 17 May 1997 entered into by the plaintiff was null and void and that the judgment obtained by the defendant against the plaintiff in the Sessions Court on 1 March 2002 be set aside. The

I grounds for the application were: (a) that the guarantee agreement, guaranteeing a larger sum than the balance originally payable under the agreement without being executed before a

Magistrate or Commissioner for Oaths, contravened s. 22(a) of the Hire Purchase Act ("the Act") and was therefore null and void; and (b) that by failing to state the object guaranteed, the guarantee was uncertain and therefore null and void as it contravened s. 30 of the Contracts Act 1950. The defendant was granted leave to enter summary judgment on 1 March 2002 in the Sessions Court. The plaintiff did not appeal against that decision and instead, filed this application.

Held (dismissing the application with costs):

(1) An earlier perfected and sealed order could be attacked in any subsequent collateral proceeding whenever it is being relied upon. An action commenced merely to have it declared null and void and to be set aside cannot be maintained. (para 14)

(2) The defendant did set out in tabular form various charges, including other charges included in the total amount payable. Certain charges consequent upon a breach, such as repossession and storage charges ("default charges") were not stated. The hire purchase agreement provided that upon a default by the hirer, the outstanding amount that the hirer may be called upon to pay included default charges which did not fall within the definition of "the balance originally payable under the agreement". The guarantee was not limited to payment of "the balance originally payable under the agreement" as defined, but included default charges that would become payable by the hirer. Therefore, the plaintiff as guarantor was required by the guarantee to pay more than just the "balance originally payable under the agreement". The guarantee was thus void by operation of s. 22 of the Act. (paras 22, 23, 24 & 28)

(3) Section 22 merely requires that the guarantee be executed in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public and imposes no further requirement that they verify that the plaintiff understood clearly that he would be liable for more than the "balance originally payable". The provision in s. 22 is not therefore substantive but is in its nature a formality or procedural step. It is distinguishable from a breach of a prohibitory provision. In the circumstances of this case, the breach was not as to a substantive provision of law. (para 30)

(4) The order, other than the fact that the guarantee was in contravention of s. 22, was otherwise obtained regularly. The objection of contravention of s. 22 was not raised in the Sessions Court. No reason was given. No appeal was made from the decision of the Sessions Court. There was no substantial miscarriage of justice. (para 31)

(5) The second objection that the guarantee did not state the object or goods that was the subject of the guarantee was rejected as being without substance since the guarantee was not upon an entirely separate document, but was part of the hire purchase agreement which specified the goods the subject of the hire purchase. This argument was also not raised in the proceeding in the Sessions Court. It could not now be raised in this application. (para 32)

Case(s) referred to:

Anthony Dubis v. Syarikat Kuin Jee Sdn Bhd [1996] 1 LNS 81 HC

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA

Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC

Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd [1979] 1 LNS 96 FC

Legislation referred to:

Contracts Act 1950, ss. 30, 66

Hire Purchase Act 1967, ss. 4C(1)(c), (ix), 22(a)

For the plaintiff - B Kasturi Kesveren; M/s Kas & Abdul Malik

For the defendant - Dhyana Shila (Norhamimah Mohd Baseri with him); M/s Soo Thien Ming & Nashrah

Reported by Amutha Suppayah

JUDGMENT

Abdul Wahab Patail J:

[1] Enclosure 1 is an originating summons filed by plaintiff for:

(a) a declaration that a guarantee agreement dated 17 May 1997 entered into by the plaintiff is null and void;

(b) an order that the judgment obtained by the defendant against the plaintiff in the Sessions Court on 1 March 2002 be set aside;

(c) costs, and

(d) such other orders and reliefs as the court thinks fit.

[2] The grounds for the application are:

(a) That the guarantee agreement, guaranteeing a larger sum than the balance originally payable under the agreement without being executed before a Magistrate or Commissioner for Oaths, contravened s. 22(a) of the Hire Purchase Act and is therefore null and void.

(b) That by failing to state the object guaranteed the guarantee is uncertain, therefore it is null and void as it contravenes s. 30 of the Contracts Act.

[3] Pursuant to an order on 20 October 2003, the parties had filed their written submissions as at encls. 11, 12 and 13. On 2 December 2003, the court ordered the parties to file further submission on the issue of the validity of the Hire Purchase Agreement and on the meaning of the terms "Balance originally payable under the agreement" and "all other sums of money which may become payable by the hirer". The parties' further written submissions are as at encls. 16 and 17.

The Preliminary Objection

[4] The submissions include a preliminary objection. The defendant was granted leave to enter summary judgment on 1 March 2002 in the Sessions Court Kuala Lumpur in Civil Suit 1-52-8561-99. The plaintiff did not appeal against that decision. Instead, the plaintiff filed this application in the High Court Kuala Lumpur on 22 March 2003 to seek declarations that:

(a) The guarantee agreement dated 17 May 1997 between the plaintiff and the defendant is null and void;

(b) The order dated 1 March 2002 obtained by the defendant against the plaintiff in the Sessions Court Kuala Lumpur Summons 1-52-8561-99 be set aside;

A (c) Costs to be paid by the defendant;

(d) Such other reliefs as the court thinks fit.

[5] The plaintiff relied upon *Anthony bin Dubis v. Syarikat Kuin Je Sdn Bhd* [1996] 1 LNS 81 HC; *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; [1980] 1 MLJ 21 FC; and *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC.

[6] *Anthony bin Dubis v. Syarikat Kuin Je Sdn Bhd* was a case in which it was alleged that the plaintiff was in contempt of a consent judgment, the basis for which emanated from five documents. It was held that the defendants could not seek a committal order against the plaintiff under an illegal transaction in which they have participated. The principle applied in that case was that the court would not assist a person who comes before it with unclean hands.

[7] The same principle was applied in *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* where it was held that the appellants were aware of the illegality when they entered into the agreement and therefore s. 66 of the Contracts Act 1950 could not assist them in the application before that court.

[8] In *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd*, the appellants gave a third party charge to secure money to be lent by the respondent to one Ismail bin Omar. Upon breach of the loan agreement by the latter the respondent foreclosed. The appellant applied before the court to declare the charge as well as the order for sale null and void as being in contravention of the Malay Reservations Enactment (FMS Cap 142). The High Court granted the declarations sought, and upon the respondent's summons filed in the same proceeding made a further order invoking s. 66 to direct the appellant to repay the monies. Months later the court made a second order declaring that the appellants had received a benefit or advantage directly and ordered the land to be sold and the proceeds utilised to repay the respondents. The appellants commenced proceedings to have the second order declared null and void, and to be set aside upon the grounds that the second order contravened s. 13 of the Malay Reservations Enactment.

[9] The issue, in simple terms was what to do with a case where a perfected and sealed order had been issued but it is found later that that order was in breach of a specific provision of law relating to the subject matter in that order. The High Court held it would be unjust to estop the appellants from challenging the second order by reference to *res judicata* or any other branch of the doctrine of estoppel because the second order was plainly against s. 13. It therefore allowed the appellants' application and declared the second order to be null and void (the third order). The Court of Appeal allowed the appeal upon the ground that the High Court was *functus officio* and had no jurisdiction whatsoever to set aside the second order irrespectively of any illegality in the order.

[10] Upon an appeal to the Federal Court, the Federal Court reversed the order of the Court of Appeal.

[11] The main judgment, delivered by Mohd Azmi FCJ and concurred by Eusoff Chin CJ and Wan Adnan FCJ took the view the High Court could not make the second order which:

(a) amounted to an order under the guise of a claim for remedy under s. 66 of the Contracts Act 1950; and (b) was a violation of s. 13, and holding that the High Court had the necessary jurisdiction to set aside the second order, and the principle of *functus officio* or *res judicata* could not in any way defeat the inherent jurisdiction of the court to do justice in that particular case. Peh Swee Chin FCJ held that the second order which defeated the first order was a resuscitation of the order for sale which the court had earlier set aside, and as such abuse of process should be stayed permanently.

[12] Declaring that it is well settled that even court of unlimited jurisdiction have no authority to act in contravention of written law, Gopal Sri Ram JCA sitting in the Federal Court held that it is open, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside.

[13] Thus, the majority did not seek to reconcile the concept of *res judicata* or estoppel with the concept that an order of a court of unlimited jurisdiction cannot be impugned on the ground that it is void in the sense it may be ignored or disobeyed, satisfying itself that *res judicata* or estoppel cannot in any way defeat the inherent

jurisdiction to do justice. Peh Swee Chin FCJ sought to stay permanently the errant order. Gopal Sri Ram JCA sought to confront the issue effectively by limiting the power or authority of an order of court. The reconciliation was in fact set out in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21 FC where Abdoolcader J, in delivering the judgment of the then Federal Court held:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack.

[14] All the judgments are clear that an order can only be made in collateral proceedings by a court of law. While the majority decision held that the principle of *res judicata* or *functus officio* cannot defeat the inherent jurisdiction to do justice, it ordered that the earlier order be set aside, not stayed. Gopal Sri Ram JCA ordered that the earlier judgment be set aside. Abdoolcader J in *Eu Finance Bhd v. Lim Yoke Foo* suggests that the earlier perfected and sealed order could be attacked in any subsequent collateral proceeding whenever it is being relied upon, suggesting therefore that an action commenced merely to have it declared null and void and to be set aside cannot be maintained.

[15] Be that as it may, the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* accepted that such an application could be maintained. In *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 CLJ 532 the Court of Appeal held *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* is distinguishable where the order had been obtained regularly, the defect is procedural and it does not occasion a substantial miscarriage of justice.

[16] The objection relies upon the premise that the sum guaranteed under the guarantee agreement of 17 May 1997 contravened s. 22 of the Hire Purchase Act, and which is the same question arising in the plaintiff's application.

[17] In the circumstances, I would therefore not deal with the objection as a preliminary objection but consider first the precise nature of the breach and then the question whether there is a breach of s. 22 before deciding upon the objection.

Whether There Is Breach Of s. 22

[18] A guarantor is protected by s. 22 of the Act. Section 22 of the Hire Purchase Act provides as follows:

> **22. Guarantor not to be bound in certain cases**
>
> Where a guarantor of the performance of the obligations of the hirer under a hire-purchase agreement enters into an agreement binding the guarantor:
>
> (a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement; or
>
> (b) to perform an obligation in respect of goods other than the goods comprised in the hire purchase agreement,
>
> the agreement so entered shall be void unless the agreement is executed by the guarantor in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

[19] The precise terms of the guarantee agreement of 17 May 1997 is as follows:

> IN CONSIDERATION OF your entering into aforesaid Hire Purchase Agreement dated the 17th of May 1997 having at my request agreed to hire to the Hirer the Goods herein referred to I HEREBY UNDERTAKE and GUARANTEE the payment of the said rents and all other sums of money which may become payable by the Hirer under the terms of the above written Agreement and the performance and observance of the said stipulations and conditions by the Hirer therein contained and hereby UNDERTAKE TO INDEMNIFY the Owner against all loss, damage or expense which the Owner may sustain by reason of the neglect of the Hirer to observe or perform any of the stipulations on his part contained in the above written Agreement And I the Guarantor agree that this Guarantee shall not be in anyway avoided released or affected by the Owner giving time to the Hirer granting him any indulgence or granting him any further or other credit or loan facility or facilities in and of any amount whatsoever or by the Owner and the Hirer making any variation in the terms of the said Agreement (all which things the Owner shall be at liberty to do) Provided that no variation shall make me liable for a greater maximum sum under this Guarantee than that for which I am liable as the above-written Agreement now stands And I Agree as between me and the Owner I shall be deemed to be a principal debtor and I waive all suretyship and other rights inconsistent with the clause.

I HEREBY ACKNOWLEDGE to have read the said Hire Purchase Agreement or a copy thereof.

Any notice or demand for payment may be made in writing and may be signed on behalf Owner by the Manager, Assistant Manager, Accountant or any other duly authorised officer of the Owner or by any Solicitors or firm of Solicitors acting or purporting to act for the Owner and shall be deemed to have been given if served on me personally or sent to me by prepaid ordinary mail accompanied by a certificate of posting or left at the address stated herein or at my usual or last known business or private address. Such notice or demand shall be deemed to be received by me within seventy two (72) hours after the date of such posting despite any evidence to the contrary.

I confirm that the contents and effects of this Letter of Guarantee have been explained to me before the execution thereof and I fully understand the legal implications and consequences of the same.

[20] Two issues were raised in respect of the guarantee:

(i) That "the payment of the said rents and all other sums of money which may become payable by the Hirer under the terms of the above written agreement" ... and "all loss, damage or expense which the owner may sustain by reason of the neglect of the hirer" renders the guarantor liable to a sum which is more than "the balance originally payable under the agreement";

(ii) That there is uncertainty because there is no mention in the guarantee what is object that is guaranteed.

The term "the balance originally payable under the agreement" is used in the table of payments in the hire purchase agreement. It is a term which has a technical meaning as assigned in s. 4C. Section 4C provides:

4C. Contents of hire-purchase agreement.

(1) Every hire-purchase agreement:

(a) shall:

(i) specify a date on which the hiring shall be deemed to have commenced;

(ii) specify the number of installments to be paid under the agreement by the hirer;

(iii) specify the amounts of each of these installments and the person to whom and the place at which the payments of these installments are to be made;

(iv) specify the time for the payment of each of those installments;

(v) contain a description of the goods sufficient to identify them;

(vi) specify the address where the goods under the hire-purchase agreement are;

(b) where any part of the consideration is or is to be provided otherwise than in cash, shall contain a description of that part of the consideration;

(c) shall set out in a tabular form:

(i) the price at which at the time of signing the agreement the hirer might have purchased the goods for cash (in this Act referred to and in the agreement to be described as "cash price");

(ii) the amount paid or provided by way of deposit (in this Act referred to and in the agreement to be described as "deposit") showing separately the amount paid in cash and the amount provided by any consideration other than cash;

(iii) any amount included in the total amount payable to cover the expenses of delivering the goods or any of them or to the order of the hirer (in this Act referred to and in the agreement to be described as "freight");

(iv) any amount included in the total amount payable to cover vehicle registration fees in respect of the goods (in the agreement to be described as "vehicle registration fees");

(v) any amount included in the total amount, payable for insurance in respect of the goods or any of them;

(vi) the total of the amounts referred to in sub-paragraphs (i), (iii), (iv) and (v) less the deposit;

A (vii) the amount of any other charges included in the total amount payable (in this Act referred to and in the agreement to be described as "terms charges");

(viii) the annual percentage rate for terms charges which
B shall be calculated in accordance with the formula set out in the Seventh Schedule;

(ix) the total of the amounts referred to in subparagraphs (vi) and (vii) of this paragraph (in this Act referred
C to as "the balance originally payable under the agreement"); and

(x) the total amount payable;

(d) shall not contain any particulars which differ in any
D material way from the particulars contained in the written statement or statements served on the hirer pursuant to s. 4(1)(a) or 4(1)(b), as the case may be.

[lns. Act A813]

E (2) A hire-purchase agreement that contravenes subsection (1) shall be void.

(3) An owner who enters into a hire-purchase agreement in contravention of subsection (1) shall, notwithstanding that
F the hire purchase agreement is void, be guilty of an offence under this Act.

[21] It is abundantly clear that s. 4C(1)(c) demands that the hire purchase agreement must set out in tabular form the balance
G originally payable under the agreement, which term is defined in sub-paragraph (ix) as the total of the amounts referred to in subparagraphs (i), (iii), (iv) and (v) less the deposit, and the terms charges as defined in subparagraph (vii) as the amount of any other charges included in the total amount payable. Subsection (2)
H provides that a hire purchase that contravenes subsection (1) shall be void.

[22] The defendant in this case did set out in tabular form various charges, including other charges included in the total amount payable. Certain charges consequent upon a breach, such
I as repossession and storage charges (hereafter referred to as

default charges) were not stated. Section 4C(1)(c) does not require these default charges to be stated in tabular form. The language of s. 30 does make it clear that the term "terms charges" as used in the Act does not refer to default charges.

[23] The conclusion is that the hire purchase agreement in this case provides that upon a default by the hirer, the outstanding amount that the hirer may be called upon to pay includes default charges which does not fall within the definition of "the balance originally payable under the agreement".

[24] The plaintiff's undertaking and guarantee to pay "said rents and all other sums of money which may become payable by the hirer under the terms of the above written agreement" obviously requires the plaintiff as guarantor to pay all sums that may become payable by the hirer. The guarantee is not limited to the payment "the balance originally payable under the agreement" as defined, but would include default charges that become payable by the hirer. In other words, the plaintiff as guarantor is required by the guarantee to pay more than just the "balance originally payable under the agreement".

[25] The basis of the plaintiff's case is that the term "balance originally payable under the agreement" is defined in s. 4C and is used in s. 22. There is nothing in s. 22 to suggest that the term is to have a meaning that is different from the definition in s. 4C(1)(c)(ix).

[26] The defendant submitted that the actual amount claimed under the guarantee in this case is less than the amount specified as balance originally payable in the hire purchase agreement. On the face of it that argument finds some support from the language of s. 22(a). The section did not simply use the phrase "balance originally payable under the agreement" but instead adds before it the term "an aggregate":

> (a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement; or

If the intent is to confine the operation of s. 22(a) to the outstanding amount of the items comprising the "balance originally payable under the agreement" as defined in s. 4C, then the following language would suffice:

A (a) to pay to the owner a sum which is larger than the balance originally payable under the agreement; or

or

(a) to pay to the owner an amount which is larger than the
B balance originally payable under the agreement; or

Since the words "balance originally payable under the agreement" in s. 4(c) is clearly the sum of a number of items, Parliament must intend, from the use of the words "an aggregate sum" to be more
C than the items defined in section 4(c) as comprising the "balance originally payable under the agreement", but to include also other charges, so long as the total of it does not exceed the "balance originally payable under the agreement" when the guarantee was signed.

D **[27]** There is however a flaw in the argument. If accepted it would result in a guarantee that includes repossession and storage charges to be in excess of the "balance originally payable" at the time of its signing and in the early stages of the hire until such time as sufficient rents has been paid to bring down the
E outstanding sum. Section 22 is very clear that the entire guarantee is void, not merely void in respect of the excess or merely voidable. It cannot, therefore, envisage a guarantee that is void at one stage and valid at another.

F **[28]** It is clear, therefore, that the guarantee is void by operation of s. 22 of the Act.

[29] As has been made clear in *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd*, the fact of contravention of a law is not the
G sole consideration. That decision is binding upon this court. Following *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* the next question this court must inquire into is whether the breach is substantive and occasioned a substantial miscarriage of justice.

H **[30]** As to whether the breach is substantive, it must be borne in mind that s. 22 merely requires that the guarantee be executed in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public, and unlike similar legislation elsewhere, imposes no further requirement that they verify that the plaintiff understood clearly that he would be liable for more than the "balance
I originally payable". The provision in s. 22 is not therefore

substantive but is in its nature a formality or procedural step. It is distinguishable from a breach of a prohibitory provision such as s. 13 of the Malay Reservations Enactment. In the circumstances of this case, I would hold the breach is not as to a substantive provision of law.

[31] In this case, the order made on 1 March 2002 clearly states that an affidavit in reply was filed for the defendants in the Sessions Court, that counsel appeared for the defendants and was heard. The order was made *inter partes*. The order, other than the fact that the guarantee was in contravention of s. 22, was otherwise obtained regularly. As is clear from the submissions, the objection of contravention of s. 22 was not raised in the Sessions Court. No reason was given. No appeal was made from the decision of the Sessions Court. No reason was given. This case is thus similar to the fact parameters of *Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd*. I would hold there is no substantial miscarriage of justice.

[32] The second objection is that the guarantee does not state the object or goods that is the subject of the guarantee. I reject the argument as being without substance since the guarantee is not upon an entirely separate document, but is part of the hire purchase agreement which specifies the goods the subject of the hire purchase. This argument, even if it were to be entertained, should have been but was not raised in the proceeding in the Sessions Court. It cannot now be raised in this application.

[33] The application was, therefore, dismissed with costs.